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Supreme Court of the United States

OCTOBER TERM, 1945

No. 704

IRENE MORGAN,

Appellant,

vs.

COMMONWEALTH OF VIRGINIA,

Appellee.

Appeal from the Supreme Court of Appeals of the Commonwealth of Virginia

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE WORKERS DEFENSE LEAGUE, *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable the Supreme Court of the United States:

The undersigned, as counsel for the Workers Defense League, respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. The consent of the attorneys for the appellant to the filing of this brief has been obtained. The attorney for the appellee has failed to reply to repeated requests for such consent.

Special reasons in support of this motion are set out in the accompanying brief.

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No. 704

IRENE MORGAN,

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vs.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE WORKERS DEFENSE LEAGUE, *AMICUS CURIAE*

The Workers Defense League is submitting a brief herein as *amicus curiae* because of its interest in the issue of race discrimination raised in this case.

The Workers Defense League is an organization dedicated to the protection and extension of those civil rights which are guaranteed by the laws and Constitutions of the United States and the several states.

It maintains that right to free and unrestricted travel in interstate commerce is one of the attributes of free citizenship and forms a part of the keystone of our democratic form of government. Any interference by a state or its political subdivisions based solely on race, creed or color is unwarranted and is calculated to create antagonisms between the peoples of the United States and threatens its peace, security, social and economic well being.

Statutes Involved

The Virginia statute primarily involved (Acts of Assembly, 1930, Chap. 128, pp. 343-344) is one entitled, "An Act to provide for the separation of white and colored passengers in passenger motor vehicles within the State; to constitute the drivers of said motor vehicles special policemen, with the same powers given to conductors and motormen of electric railways by general law." This statute, now appearing as Sections 4097Z to 4097dd of Michie's Code of Virginia, 1942, is set out in full in the appellant's statement as to jurisdiction. Sections 4097Z to 4097cc are summarized in the Record (R., pp. 7, 8) and Section 4097dd is set out in full therein (R., pp. 8, 9).

Inasmuch as the statute in question uses the terms "white" and "colored" persons, it is necessary to refer to Section 67 of Michie's Code of Virginia, 1942, which defines the term "colored person". Section 5099a of Michie's Code, which defines the term "white person" for certain purposes is also relevant. These statutes are set out in the argument, below, so far as pertinent.

Questions Presented

The questions presented by this case and to which this brief is addressed are:

1. Is the Virginia statute (above cited) which provides for the separation of "white" and "colored" passengers in passenger motor vehicles valid insofar as it affects vehicles engaged in interstate transportation?

2. Is the statute contrary to the public policy of the United States, especially as embodied in Articles 55 and 56 of the Charter of the United Nations (ratified by the U. S. Senate July 28, 1945)?

It is noted that Question 2 was not raised in the Appellant's Statement as to Jurisdiction, but inasmuch as it has a bearing on the validity of the statute under which the appellant was convicted, it is both proper and helpful to discuss it in this brief.

Statement of the Case

On July 16, 1944, appellant, who is a Negro, was a passenger on a bus of the Richmond Greyhound Lines, Inc., traveling from Hayes Store in Gloucester County, Virginia, to Baltimore, Maryland, on a through ticket purchased by her from said company. The vehicle itself was traveling on a continuous and through trip from Norfolk, Virginia to Baltimore, Maryland, via Washington, D. C. During this journey, at Saluda, Virginia, the driver of the bus, a regular employee of the Richmond Greyhound Lines, Inc., in charge and control of the bus, directed appellant to remove from the seat which she was occupying in the front of the bus, to a seat in the rear pursuant to a design to segregate white and colored passengers in accordance with the herein and above-cited statute of Virginia. Appellant refused to move, whereupon the driver procured a warrant and caused her to be arrested upon a charge of violating the segregation law and particularly section 4097dd. Upon this charge she was tried and convicted.

The appellant was tried in the Circuit Court of the County of Middlesex, Virginia, upon an amended warrant charging that on the 16th day of July, 1944, she did "Unlawfully refuse and fail to obey the direction of the driver or operator of the Greyhound Bus Lines to change her seat and to move to the rear of the bus and occupy a seat provided for her, in violation of section 5 of the Act, Michie Code of 1942, section 4097dd." She was found guilty by the trial judge sitting without a jury, and on October 18, 1944, was sentenced to pay a fine of $10.

The conviction was affirmed by the Supreme Court of Virginia by the judgment which is the subject of the present appeal, the court holding that the segregation statute is "a reasonable police regulation"; that it is applicable to interstate commerce and that it does not violate the Fourteenth Amendment to the U. S. Constitution.

ARGUMENT

I. Introductory

Since the vehicle upon which the appellant was riding was engaged in interstate commerce, the statute violates Article I, Section 8 of the U. S. Constitution. Moreover, the statute is contrary to the public policy of the United States, and more particularly violates Articles 55 and 56 of the Charter of the United Nations, wherein all members pledge themselves to promote "• • • universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Furthermore, the statute is unconstitutional because it violates the Fourteenth Amendment, Section 1, of the U. S. Constitution in that it deprives persons of liberty without due process of law.

II. The Interstate Commerce Aspects

A. General Principles.

The law relating to the extent to which a state may, under its "police power", place a burden upon interstate commerce has been recently clearly defined in *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761. It was held in that case that the commerce clause (Art. I, Sec. 8) of the Federal Constitution, even without the aid of Congressional

legislation, protects against state legislation which is inimical to the national commerce; and in such cases, where Congress has not acted, this Court, and not the state legislature, is the final arbiter of competing demands of state and national interests (p. 769). In such cases, the question is whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference (pp. 770, 781).

B. Effect of permitting states to apply their segregation laws to interstate commerce is to burden and hinder such commerce.

The Virginia segregation statute is inherently burdensome to interstate commerce. If Virginia has the right to regulate the segregation of passengers in interstate vehicles, other states have the same right. It is obvious that the result of having the various states legislate in this field is necessarily to subject the carriers to non-uniform and conflicting regulations in the course of a single trip.

Where segregation statutes or regulations are in force and effect, carriers must and do supply separate facilities which add to the cost of operations. This undoubtedly results in increased costs to the public and resists otherwise justifiable reductions in passenger rates. These rates must be approved by the Interstate Commerce Commission and there is a direct relation between segregation to the free flow of Interstate Commerce under Article I, Section 8 of the Constitution.

Twenty states have enacted "Civil Rights Acts" prohibiting racial segregation in places of public accommodations: California, Colorado, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island,

Washington, Wisconsin, Maine and New Hampshire. On the other hand, thirteen states provide by statute for some measure of racial segregation of passengers on public carriers: Alabama, Arkansas, Florida, Georgia, Kentucky, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia.

Moreover, there is no uniformity in the latter states as to who is a "colored person" or "Negro". These terms have been variously defined as including all persons in whom there is ascertainable any Negro blood whatsoever; all persons of Negro or African descent; those who are of Negro blood to the third generation inclusive; those who are of Negro blood to the fourth generation inclusive; those who have one-fourth or more Negro blood; and those who have one-eighth or more Negro blood. It is evident that the same passenger in making a trip across state lines might be classified as a colored person in some states and as a white person in others.

The segregation laws throw the burden of ascertaining the race of each passenger on the employees of the carrier. The Virginia statute, which is typical in this respect, provides that the bus driver shall be "the judge of the race of each passenger whenever such passenger has failed to disclose his or her race" (Sec. 4097*cc*, Michie Code, 1942). Many persons have no way of knowing whether they have, for example, one-eighth, one-sixteenth, one-thirty-second or for that matter, any Negro blood, as the requisite genealogical data is in most cases inadequate, inaccessible or entirely missing. To throw this burden on the bus driver is clearly unreasonable and obviously cannot result in accurate determinations.

It is therefore submitted that the effect of permitting states to apply their segregation laws to interstate commerce clearly burdens and hinders such commerce.

C. The exercise of the police power in the guise of the segregation laws cannot be justified to permit state interference with interstate commerce.

The recent decision of this court in *Southern Pacific Co.* v. *Arizona, supra,* reaffirmed in passing, the doctrine of *Hall* v. *De Cuir,* 95 U. S. 485, in the following language:

> "• • • the commerce clause has been held to invalidate local 'police power' enactments • • • regulating the segregation of colored passengers in interstate trains, *Hall* v. *De Cuir,* supra, 488-9."

It is submitted that *Hall* v. *De Cuir* is here squarely in point and should be applied accordingly.

The state court has attempted to distinguish the present case from *Hall* v. *De Cuir* case on the ground that the statute in the latter case prohibited racial segregation, whereas the Virginia statute makes segregation mandatory. The court also stated that "it is apparent that the Louisiana Act was not enacted in pursuance of the police power of the State, while the Virginia Act was enacted under the police power".

Concededly, the Louisiana statute prohibited segregation and the Virginia statute compels it. This is the head and tail of the same coin and it is by no means apparent that the former statute was not enacted in pursuance of the police power and that the latter was. To make such an assumption is to assume that the police power may be used only to create divisions among the people and not to create conditions conducive to unity. Such an interpretation of the police power is extremely far fetched and the Virginia court has disclosed no authority for it. On the other hand, many states and federal courts have held that statutes compelling segregation are not applicable to interstate carriers. *Washington, B. & A. Elec. R. Co.* v. *Waller,* 53 App. D. C. 200, 289 Fed. 598; *Thompkins* v. *Missouri, K. & T. Ry. Co.* (C. C. A. 8th), 211 Fed. 391; *McCabe* v. *Atchison, T. & S. F. Ry. Co.* (C. C. A. 8th), 186 Fed. 966; *Anderson* v. *Louisville & N. R. Co.* (C. C. Ky.), 62 Fed. 46; *Brown* v. *Memphis & C. R. Co.* (C. C.

Tenn.), 5 Fed. 499; *State* v. *Jenkins*, 124 Ind. 376; *Hart* v. *State*, 100 Md. 596; *Carrey* v. *Spencer* (N. Y. Sup. Ct.), 36 N. Y. S. 886; *State ex rel. Abbott* v. *Hicks*, 44 La. Ann. 770.

It is hence submitted that under the authority of *Southern Pacific Co.* v. *Arizona* and *Hall* v. *De Cuir*, above discussed and in view of the other cases cited, the Virginia segregation act is not such an exercise of police power as will make inapplicable the general rule safeguarding interstate commerce from state interference.

D. The Virginia statute as applied to interstate commerce is unreasonable, arbitrary and capricious and not a valid exercise of the police power.

If we concede for purpose of argument only, that segregation may be a valid exercise of the police power, this statute, far from being a reasonable exercise, is wholly arbitrary and capricious.

The statute uses the terms "white" and "colored" persons. "Colored persons" are defined in Section 67 of Michie's Code of Virginia as follows:

> "§67. COLORED PERSONS AND INDIANS DEFINED.
>
> Every person in whom there is ascertainable any negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes living on reservations allotted them by the Commonwealth of Virginia having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians so long as they are domiciled on said reservations."

The only definition of "white persons" appearing in Michie's Code is that given in the statute dealing with inter-racial marriages. This statute, which is Section 5099a of the code, recites in its penultimate paragraph:

> "For the purpose of this act, the term 'white person' shall apply only to the person who has no trace what-

> soever of any blood other than Causasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons."

The term "colored person" is so defined as to include all persons having any ascertainable Negro blood, except for persons having certain admixtures of American Indian blood. If this definition of "colored person" were to be strictly followed, especially in view of the definition of "white person" given in Section 5099a of Michie's Code, there would be very few, if any, persons sitting in those sections of vehicles assigned to "white persons". It is a well known anthropological fact that mankind has been migrating and inter-breeding since the earliest times. Almost all persons have innumerable descendants whose quantum of Negro blood would not be observable in their features.

Section 4097z to 4097dd of Michie's Code of Virginia, 1942, imposes on the driver the duty and obligation, under criminal penalty, to determine the racial identity of a person on the basis of physical appearance alone.

Likewise the passenger is under criminal penalty to segregate himself, yet this duty with its severe penalty must be met regardless of the ill-defined and tenuous nature of the definition of "white" and "Negro".

The Supreme Court of the United States has ruled in *Lanzetta et al.* v. *State of New Jersey*, 306 U. S. 451, at page 453:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

The statute in question therefore violates the due process of law contained in the Fourteenth Amendment.

But, accepting, in arguendo, the proposition that all or a majority of persons who designate themselves as white

have not the slightest quantum of Negro blood, it is apparent that the statutory definitions violate the principles of fair and logical classification. If the term "white person" is restricted to those presumed to be 100% white, then why should "colored person" not be defined analogously, i.e., a person who is 100% Negro. Conversely, if a "colored person" is one who has any ascertainable Negro blood, why isn't a "white person" one having any ascertainable white blood?

The only apparent answer is that the definitions were not found on any level of reason and intellect but on the lower level of prejudice. For no intelligent person guided solely by his reason could have arrived at such definitions. And where reason is thrown into the discard in writing a definition, it cannot be pretended that either the definition or any statute depending on it is reasonable.

Although the segregation statute and the definition on which it rests are obviously drawn in accordance with those notions of "white supremacy" which are prevalent in the South (cf. "Racial Purity Act", Sec. 5099a of Michie's Code, *supra*) the fact is that it is really more discriminatory against "white persons" than against "colored persons". For a "white person", in a public vehicle, can sit only next to another "white person", that is, a 100% white, while a colored person may sit next to persons of varying blood mixtures. For example, a 100% Negro may sit next to one who has only one-eighth or one-thirty-second of Negro blood. Obviously, the "colored persons" have a much wider range of company.

Another respect in which the statute is arbitrary and discriminatory is that it tends to discourage and obstruct inter-racial friendships. It works a hardship on those having friends of the other "race" by not permitting them to sit together in public vehicles. Furthermore, by placing the stamp of official disapproval on inter-racial mingling, it prevents the growth of friendship and tolerance between the "races" and perpetuates whatever existing suspicion and hostility there may be.

The state court held that this statute, which enforces segregation is a valid exercise of the police power (R., pp. 60, 61, 68). It is not apparent how any statute can be a valid exercise of the police power unless it furthers the health, safety, comfort or morals of the people. The state court has not indicated how any of these desiderata are furthered by segregating the people according to race. Presumably, however, the theory is that segregation makes for more peaceful relations between the races. This can only be based on the assumption that two groups can best grow to understand, tolerate and respect each other by having as little to do with each other as possible. Observers of the current scene have concluded that segregation does not promote tolerance and mutual understanding, but on the contrary, suspicion and hostility. Two such observers, namely, Alfred McClung Lee, Chairman of the Department of Sociology, Wayne University, and Norman Daymond Humphrey, Assistant Professor of Sociology, Wayne University, in their book, "Race Riot" (New York, N. Y., Dryden Press, Inc., 1943), commenting on the rioting which occurred in Detroit, Michigan, during the week of June 20, 1943, draw the following conclusions from their observations and studies:

> "The three most constructive lessons of the Detroit week of June 20, 1943, point to the three effective ways of implementing the Golden Rule, three of the most practical objectives that emerge as goals for a long-term program. These objectives in the fields of (1) living, (2) learning, and (3) working point vividly to the virtue of the homely expression that 'you can learn to like most anyone if you get to know him.' Here are the senses in which we refer to living together, learning together, and working together.
>
> '1. Through experiences in neighborliness, or even in mere nearness, we can learn to live nearby people of another race without antagonistic racial frictions. In the Detroit riots, let us note again, observer after observer reported that no noteworthy trouble occurred in mixed districts where

whites and Negroes had lived as neighbors long enough to get to know and understand each other.

"2. Through the casual experience of classroom and playgrounds, white and Negro children and adults can learn to associate with one another in schools and colleges without antagonistic racial friction. Disorders between whites and blacks have taken place in Detroit's high schools, especially one that resulted in the stabbing of a student in 1941 at Northwestern High School. But that very uncommon incident emphasized by its uncommonness the rule that schooltime associations diminish race frictions. After all, the students of Wayne University—in the heart of Detroit—went about their business on Monday, June 21, 1943, without any reported friction. "Going to school together" works powerfully against intolerance, especially when the school administrators and teachers count this lesson among their objectives.

"3. Through the common experiences of shop work and union activity, whites and Negroes learn to appreciate each other's better qualities and to recognize their rights as fellow human beings. Here again occasional apparent exceptions develop, such as the Klan-inspired Packard strike that demanded the discriminatory treatment of Negroes, but the details of such cases indicate they are not actual exceptions: The Packard strike was inspired by the Ku Klux Klan. As Major General Henry S. Aurand declared on Bloody Monday, there were no disturbances in the Detroit war plants, and U. S. Attorney General Francis Biddle later substantiated this observation'" (p. 140).

Further light on the beneficial effects of close proximity is cast by an installment of the Extension of Remarks of Representative Helen Gahagan Douglas of California, appearing in the Congressional Record, January 28. Representative Douglas presented material, gathered from the War Department, on the war record of Negro soldiers. The January 28th installment contains the following significant passage (p. A274):

"Negro rifle platoons fought with the First, Second, Eighth, Ninth, Sixty-ninth, Seventy-eighth, Ninety-ninth and One Hundred and Fourth Infantry Divisions of the First Army; and Negro companies joined armored infantry battalions of the Twelfth and Fourteenth Armored Divisions.

"'If comments of white personnel of these divisions are any indication, the plan of mixing white and colored troops in fighting units, a departure from previous United States Army practice, is operating successfully', a Stars and Stripes staff writer reported in an article in the paper's April 6 issue.

"Negro reinforcements reported a sincere, friendly welcome everywhere. They also spoke of excellent relations with their white fellow-doughrs, of the making of inter-racial friendships.

"One company commander's comment was typical. 'The integration of the Negro platoon into this unit was accomplished quickly and quietly. There was no problem'."

It may be pointed out that the District of Columbia and the State of Maryland have substantial colored populations yet there is no segregation on public carriers and there is no evidence that any violence or racial tension has been engendered or aggravated by such non-segregation. For this and other reasons indicated, the Virginia segregation statute is not a reasonable exercise of the police power, but is unreasonable, arbitrary and capricious.

III. The Virginia statute is inconsistent with Articles 55 and 56 of the Charter of the United Nations

The Charter of the United Nations embodies the public policy of the United States. Moreover, inasmuch as the Charter is a treaty, duly made by the President of the United States and ratified by the Senate (Art. 2, Sec. 2, clause 2 of the Constitution), it is the supreme law of the land (Art. 6, clause 2 of the Constitution) and must thus prevail over inconsistent state enactments. *U. S.* v. *Pink*, 315 U. S. 203; *U. S.* v. *Belmont*, 301 U. S. 324; *Nielsen* v. *Johnson*, 279 U. S. 47; *Maiorano* v. *Baltimore, etc.*, 213 U. S. 268; *Baldwin* v. *Franks*, 120 U. S. 682.

Article 55c of the United Nations Charter provides that "the United Nations shall promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Article 56 states: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The United States, as a member of the United Nations, is hence pledged to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". It is urged that this pledge is binding upon the United States and the tribunals thereof, at least to the extent that it must prevail over inconsistent state enactments. Even if it be held that the pledge is not binding to such an extent, and that it is merely a statement of national policy, as such it would still preclude the application of inconsistent state statutes affecting interstate commerce.

Article 55c of the United Nations Charter is intended to prevent any distinctions as to race, sex, language or religion from being written into legislation or official regulations of any sort which concern human rights or fundamentals freedoms. It is contended that the expressions "human rights" and "fundamental freedoms" encompass the right to travel in public vehicles unmolested, the right, in public places and vehicles, to sit together with friends regardless of differences in race and the right not to be segregated against one's will. It is urged that the expression "without distinction" goes much further than merely forbidding discriminatory practices. It forbids segregation, even when accompanied by equal facilities.

The Virginia segregation statute is especially violative of the provision in question of the United Nations Charter, in that it clearly makes a distinction in the very definitions of "white persons" and "colored persons". As brought out hereinabove, the term "colored person" is defined to include

all persons having any ascertainable Negro blood (except where such persons are classed as American Indians). The existence of non-analogous definitions of "white" and "colored" persons is obviously a discriminatory definition.

The attention of the Court is respectfully directed to *Re Drummond Wren* [1945], O. R. 778; decided by the Supreme Court of Ontario, October 31, 1945, wherein Article 55 of the United Nations Charter was cited (p. 781) as indicating that the public policy of Canada, a subscriber to the Charter, was opposed to restrictive covenants prohibiting the alienation of land to "Jews and persons of undesirable nationality". Such a covenant was accordingly held invalid. It is believed that the reasoning in that case is entitled to studied consideration. In construing a section of an international agreement or treaty, the construction given to that section by another signatory nation is of some force and effect.

In the present case, as in the Canadian, there is at issue a practiced discrimination and distinction based upon "race", and it should be stricken down no less firmly than it was in Canada.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia should be reversed.

Respectfully submitted,

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